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No. 1099

In the Supreme Court of the United States

OCTOBER TERM, 1967

MARTIN COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 661–669; Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals affirming the conviction and the denial of the motion for a new trial was entered on December 19, 1967 (R. 670; Pet. App. E). A petition for rehearing (R. 672–682) was denied on January 16, 1968 (R. 683; Pet. App. F). The petition for a writ of certiorari was filed on February 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was an improper joinder of offenses charging petitioner, an accountant, with bribery, conferring a gratuity, and aiding and abetting the receipt of unlawful fees by Internal Revenue employees.

2. Whether the court improperly omitted from its charge, on the gratuity and the aiding and abetting counts, the element of petitioner's intent.

3. Whether the court erred in charging that the propriety of the audits and the correctness of the tax returns audited were immaterial.

4. Whether testimony by an Internal Revenue auditor as to the meaning he assigned to the fact that petitioner introduced himself as a friend of a fellow-auditor was properly admitted.

5. Whether petitioner was entitled to a new trial on the ground that the prosecution had suppressed allegedly exculpatory statements by certain taxpayers, who were available to both the prosecution and the defense, but were not produced as witnesses.

STATEMENT

An indictment returned in the United States District Court for the Southern District of New York charged petitioner, an accountant, and five codefendants (employees of the Internal Revenue Service), with conspiracy and 22 substantive counts. Prior to trial, the conspiracy count was dismissed and the five codefendants pleaded guilty to various counts. The trial proceeded against petitioner alone on counts 2 through 23.

Counts 2 through 11 charged petitioner with bribery by giving money to Internal Revenue Service auditors to influence their official acts, in violation of 18 U.S.C. 201; count 12 charged a 1963 payment to an agent in violation of the amended (1962) and presently effective bribery statute, 18 U.S.C. 201(b); count 13 charged petitioner with paying a gratuity not authorized by law to a public official, in violation of 18 U.S.C. 201(f), with respect to the same 1963 payment. Counts 14 through 23 involved the same payments as alleged in counts 2 through 11, charged as receipts by the agents of unlawful fees, in violation of 26 U.S.C. 7214(a)(2) and petitioner's participation therein as an aider and abettor (R. 526–529). The jury found petitioner not guilty on counts 2 through 12 and guilty on counts 13 through 23 (R. 510). On November 17, 1966, petitioner was given concurrent sentences of imprisonment for one year (R. 558).

Clyne, one of the five codefendant office auditors who pleaded guilty, testified that in 1960, in connection with an audit, petitioner introduced himself as a friend of Gilbert Sherman, a fellow-auditor (R. 53, 55). The meeting came as the result of a prior conversation between Clyne and Sherman (R. 55–56). Clyne testified over objection that petitioner's use of Sherman's name as a mutual friend meant that Clyne "was able to talk to [petitioner] and not worry about anything, and if I gave a favorable audit I would probably get paid" (R. 60).

In January 1961, at petitioner's request, Clyne took from the unassigned file the audit of the 1959 tax return of Robert and Rose McMurtry (counts 8 and

20) and assigned it to himself (R. 83–85). On February 3, 1961, petitioner, representing the McMurtrys as their accountant, participated in an audit with Clyne and presented some documentation as to the deductions claimed. The two men agreed upon $750 as "a reasonable figure to throw up" as a disallowance of deductions claimed (R. 57–58). Clyne wrote up the report of individual audit changes and gave it to petitioner, who said that he would see Clyne when he returned with the report signed by the taxpayers (R. 58). On March 2, 1961, petitioner delivered to Clyne an envelope containing the signed report and $50 in cash (R. 59). Clyne testified as to a substantially similar course of conduct in an audit with petitioner in respect to the income tax returns involved in counts 9 and 21 (R. 62–63) and in counts 11 and 23 (R. 61–62, 70). The other four codefendant auditors—Montello, DeSibio, Deitsch, and Ryan—testified to a substantially similar course of conduct in relation to the other counts (counts 4 and 16, R. 124–127; counts 5 and 17, R. 127–132; counts 3 and 15, R. 173–177; counts 6 and 18, R. 212–214; counts 7 and 19, R. 214–217; counts 2 and 14, R. 252–256; counts 10 and 22, R. 256–258; and counts 12 and 13, R. 258–261).

Paget, a taxpayer named in counts 2 and 14, testified that he paid petitioner $150 for a bill submitted for the audit of Paget's tax return. When Paget complained of the bill and said, "Why should it be so much?" petitioner answered, "Well, that's for the guy" (R. 302–303).

At the close of the government's case, this colloquy occurred (R. 338–339):

> Mr. EDELBAUM [petitioner's counsel]. I have an application to make, Judge: I ask at this time that the government produce for my inspection any statement they have from any of the taxpayers involved in this case that in any way would exculpate the defendant in this case, under *Brady* v. *Maryland,* and I particularly address myself as to whether or not there is any statement from the defendant's wife——
>
> The COURT. The defendant's wife?
>
> Mr. EDELBAUM. I am sorry; the last witness' wife, Mr. Paget's wife, if they have a statement from her.
>
> In view of the fact that the witness has said that his wife was present at the time of this discussion that would lead me to believe that she was surely interviewed and if there is a statement in the possession of the United States Government where this woman denied any such thing took place, I think we are entitled to that under *Brady* v. *Maryland.*
>
> Th COURT. They know their obligations under *Brady.* If they don't give them to you, they are in trouble. Do you have any material?
>
> Mr. LATCHFORD [government counsel]. No, your Honor, I have nothing at all.
>
> The COURT. We will take a short recess. Was there anything else?
>
> Mr. EDELBAUM. Are you saying that you have no statements from these other people?
>
> Mr. LATCHFORD. No. I am saying that the government has nothing whatsoever which would be exculpatory as to the defendant, under *Brady* v. *Maryland.*

After the trial, petitioner filed a motion for a new trial alleging that the prosecution had suppressed or failed to disclose statements of the other taxpayers mentioned in the indictment and had failed to produce them as witnesses (R. 562–563). Appended to the motion were affidavits by such taxpayers to the effect that they had been interviewed by Internal Revenue agents and had signed statements that their tax returns and claims for deductions were correct; and that they did not know of any wrongdoing by petitioner or believe that he was guilty of bribery (R. 572–578).

ARGUMENT

1. There was no improper joinder of the 22 counts, 11 of which charged bribery, one the payment of a gratuity, and 10 the aiding and abetting the receipt of unlawful fees. These offenses were "of the same or similar character" and thus were properly joined under Rule 8(a), F. R. Crim. P. See *Finnegan* v. *United States*, 204 F. 2d 105, 109 (C.A. 8), certiorari denied, 346 U.S. 821; *Daly* v. *United States*, 342 F. 2d 932 (C.A.D.C.), certiorari denied, 382 U.S. 853. All of the offenses involved payment of unlawful fees to public officials for improper action in their official capacity. The evidence as to each count was short and simple, and there was no reason to believe that the jury could not keep separate what was relevant to each count. *United States* v. *Lotsch*, 102 F. 2d 35, 36 (C.A. 2), certiorari denied, 307 U.S. 622. The contention is mere afterthought, since petitioner's experienced counsel did not move for a severance and did not claim prejudice at the trial.

Petitioner contends that the bribery and aiding and abetting charges were alternative offenses and hence that it was error for the court not to instruct *sua sponte* that the jury could convict on one, but not on both sets of charges (Pet. 10–11). Since the jury in fact acquitted on the bribery counts and convicted only on the charges of abetting receipt of unlawful fees, it is difficult to see how such an instruction could have made any difference. In any event, no such instruction was required. See *United States* v. *Umans*, 368 F. 2d 725, 728–729 (C.A. 2), certiorari dismissed as improvidently granted, 389 U.S. 80. Unlike the aiding and abetting counts, the bribery counts required proof of a specific corrupt intent to influence official action. And unlike the bribery counts, the aiding and abetting counts required proof that the Internal Revenue auditors received a fee, not prescribed by law, for the performance of their duty. The offenses were not mutually inconsistent. The situation is thus different from *Milanovich* v. *United States*, 365 U.S. 551, where the Court held the defendant could be guilty of either larceny or receiving, but not both.

2. Petitioner contends that the court improperly omitted from its charge the element of his intent in relation to the gratuity and the aiding and abetting charges (Pet. 12). This contention was not raised at the time the charge was given as required by Rule 30, F.R. Crim. P. (R. 498). As to the gratuity count, the court charged (R. 485–486):

> It must be readily obvious to you that there is in these elements for count 13 no need for the government to prove that the payment of

> money was with a corrupt intent to influence the employee but rather only to prove that the defendant paid the money wilfully and knowingly, that is, intentionally as distinguished from inadvertently or negligently, and that such moneys were not required by law to be given but were given for or because of the performance of the audit examination of the return in question.

In a supplemental charge, the court instructed (R. 506–507):

> On the gratuity count, the government doesn't have to prove any intent at all, merely that the defendant knowingly and wilfully gave a fee for and because of the audit that was to be conducted, * * *.

The court removed the element of intent only insofar as it charged—correctly—that the jury need not find the specific intent to corrupt required for bribery. See *United States* v. *Irwin,* 354 F. 2d 192 (C.A. 2), certiorari denied, 383 U.S. 967. It told the jury, as the statute provides, that it had to find knowing and willful payment of a fee to a public official for the performance of an official act. See *United States* v. *Balint,* 258 U.S. 250.

As to the aiding and abetting counts, the court charged generally in the language of the statute (R. 487–489, 505–506). After petitioner's objection that the court, by failing to say that the aiding and abetting must have been done "wilfully and knowingly", had eliminated the necessity of a finding of petitioner's criminal intent, the court charged (R. 509):

> Gentlemen, I am sorry to call you back, but it was suggested that perhaps I might have misled you in explaining the aiding and abetting counts. I did tell you, as you asked, that there is no obligation on the government to prove that it was the defendant's intention to influence the Internal Revenue agents. What I did say was that what the government has to prove on the aiding and abetting counts is that these agents, the IRS agents, took a fee in a matter concerning the revenue law, which the law does not permit, and if you find that to be a fact then the next thing that you must find beyond a reasonable doubt is that the defendant wilfully and knowingly aided and abetted, procured or counseled the commission of that act by the agent. When I explained it to you before, I left out "wilfully and knowingly." Do you understand that?
>
> (Jurors nod affirmatively.)

This supplemental instruction told the jury that they had to find that petitioner acted with criminal intent in relation to the aiding and abetting counts. See *Screws* v. *United States,* 325 U.S. 91, 101; *Felton* v. *United States,* 96 U.S. 699, 702.

3. Petitioner claims that the court erred in charging that the propriety of the audits and the correctness of the tax returns audited were immaterial (Pet. 12–13). The court charged as follows (R. 491):

> The fact that an audit may have been proper or improper or that the returns were correct or fraudulent or the taxes were due or not due is immaterial in this case. This is not an income tax case. The central issue in this case is whether the defendant Martin Cohen promised, offered or gave money to employees of the In-

> ternal Revenue Service either to influence their decisions on matters pending before them or to reward them for the official acts performed by the employees.

Petitioner concedes that the first sentence of this instruction is correct as to the gratuity counts under *United States* v. *Irwin, supra,* 354 F. 2d 192, 197–198, but asserts that it is erroneous as to the bribery counts. The charge was correct, however, as to the bribery counts also. A person may be bribed even though he might have reached the same result without bribery. Cf. *United States* v. *Manton,* 107 F. 2d 834, 845–846 (C.A. 2), certiorari denied, 309 U.S. 664. In any event, petitioner was acquitted on the bribery counts.

4. Petitioner contends that it was error to receive auditor Clyne's testimony that petitioner's mention of the name of the fellow-auditor, Gilbert Sherman, meant to Clyne that he would probably be paid if he gave a favorable audit (R. 60). Since Clyne was referring to the words and action of petitioner himself, the impression he had conveyed to Clyne by such means was not hearsay. 7 Wigmore on *Evidence,* Sec. 1969 (3rd Ed. 1940); *Wiley* v. *United States,* 257 F. 2d 900, 908 (C.A. 8); *Batsell* v. *United States,* 217 F. 2d 257, 262 (C.A. 8). The circumstances here are significantly different from those in *United States* v. *Barash,* 365 F. 2d 395, 399–400 (C.A. 2), upon which petitioner relies. There, the state of mind of the bribed auditor was induced by the words of a third person, not by the accused.

5. The motion for a new trial, on the ground that the prosecution had suppressed allegedly exculpatory statements by clients (other than Paget) was properly denied. *United States* v. *Soblen,* 301 F. 2d 236, 242 (C.A. 2), certiorari denied, 370 U.S. 944. There was no suppression of exculpatory evidence or facts favorable to the defense. As held below, the taxpayers' affidavits that they did not know of any wrongdoing by petitioner or believe that he was guilty of bribery did not constitute evidence at all, exculpatory or otherwise. Their affidavits verifying the accuracy of their tax returns were no more than a reiteration of their sworn statements on the returns. Petitioner, in all events, knew the names of the taxpayers from the time the indictment was filed; he was aware of the contents of their returns and was perfectly free to call them as witnesses. The fact that petitioner had made an admission to Paget which the government believed of probative value did not require that the government call other taxpayers to whom no admission had been made.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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